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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ALVIN J. DIXON, RESPONDENT

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR RESPONDENTS IN OPPOSITION

James W. Klein
Counsel of Record

Elizabeth G. Taylor
Rosemary Herbert
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200

Counsel for Respondents

QUESTION PRESENTED

Whether the Double Jeopardy Clause precludes the government from prosecuting respondents for offenses for which they have already been convicted in non-summary criminal contempt trials?

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Respondents, Alvin J. Dixon and Michael Foster, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the District of Columbia Court of Appeals judgment in these consolidated cases. The en banc decision of the District of Columbia Court of Appeals is reported at 598 A.2d 724.

STATEMENT OF THE CASE

Both respondents were convicted of criminal contempt in non-summary proceedings at which the prosecution alleged and proved violations of the criminal law.

Dixon. Following his arrest on a charge of murder, respondent Dixon was released on bond pursuant to a court order which required him to "refrain from committing any criminal offense." 598 A.2d at 728. Dixon was subsequently arrested and

indicted for possession of cocaine with intent to distribute, in violation of D.C. Code § 33-541(a)(1) (1988). He was then ordered to "show cause why he should not be held in contempt" for violating the condition of his release order requiring him to "refrain from committing any criminal offense ..." 598 A.2d at 728. Following a full-fledged criminal trial at which the government proved through the testimony of four police officers that respondent Dixon had possessed cocaine with intent to distribute on January 15, 1988, he was found guilty of criminal contempt and sentenced to 180 days in jail.

Dixon then moved to dismiss the indictment charging him with possession with intent to distribute, claiming that prosecution on that charge was barred by the Double Jeopardy Clause. That motion was granted and the indictment ordered dismissed with prejudice. Following a government appeal, the Court of Appeals sitting en banc affirmed the dismissal in a unanimous decision. The Court of Appeals mandate issued on November 22, 1991.

Foster. Respondent Foster, like respondent Dixon, was subject to a court order that required him not to commit specific criminal offenses. A civil protection order directed that he "shall not molest, assault, or in any manner threaten or physically abuse" his wife. 598 A.2d at 725. Based on allegations that he had violated the prohibitions set forth in the civil protection order by inter alia grabbing his wife and throwing her against a car on November 6, 1987, throwing her down a flight of stairs on May 21, 1988, and making threats against

her on numerous occasions, including November 12, 1987, March 26, 1988, and May 17, 1988, id. at 726, Foster was prosecuted for criminal contempt for violating the civil protection order. The contempt proceeding was a full-fledged criminal trial that lasted three days and during which eight witnesses testified for the prosecution. The prosecution was conducted by the attorney who had represented Mr. Foster's wife in the civil protection order proceedings. At the conclusion of the trial, Foster was found guilty of four counts of contempt, including the November 6, 1987 and May 21, 1988, assaults, but was acquitted of all remaining counts, including those involving threats allegedly made by him on November 12, March 26 and May 17. He was sentenced to consecutive 150-day terms of imprisonment on each of the four counts.

Before the contempt trial, Foster was charged with assault with intent to kill, D.C. Code § 22-501 (1989), based on the May 21, 1988 assault on his wife, one of the incidents for which he was adjudicated in criminal contempt. He was subsequently indicted for that offense and for one count of simple assault alleged to have occurred on November 6, D.C. Code § 22-504 (1989), and for three counts of threats to injure a person, alleged to have occurred on November 12, March 26 and May 17, D.C. Code § 22-2307 (1989). All of the offenses for which he was indicted were offenses for which he had either been convicted or acquitted at the contempt trial. Foster's motion to dismiss on grounds of double jeopardy and collateral estoppel was denied by

the trial court and he appealed. The Court of Appeals decision reversed the trial court's order denying his motion to dismiss the indictment. The Court of Appeals mandate issued on November 22, 1991 and, on January 17, 1992, the indictment was dismissed with prejudice.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Because Both Indictments Have Been Dismissed With Prejudice After Petitioner Failed To Obtain A Stay Of Mandate From The Court Of Appeals, There Is No Live Case Or Controversy

Whether or not the question raised by this petition warrants this Court's review, these cases do not present an appropriate vehicle for addressing that question, since there remains no live case or controversy.

Following the decision by the District of Columbia Court of Appeals, the government did not seek a stay of mandate from the Court of Appeals. On November 22, 1991, therefore, the mandate issued from the Court of Appeals and each of these cases was remanded to the trial court for execution of the mandate. In the case of respondent Dixon, issuance of the mandate simply made final the trial court's prior order dismissing with prejudice the indictment against him.[1] In the case of respondent Foster, the trial court executed the mandate and dismissed all counts of the indictment against him, with prejudice. On February 6, 1992, the

[1]The statute that authorizes the government to take an appeal from an order dismissing an indictment, D.C. Code § 23-104(c), means, in effect, that such an order is not final until the order is affirmed on appeal and the mandate has issued.

trial court denied the government's motion for reconsideration of that order, noting that "[t]he government has not presented, nor is this Court aware of any authority permitting this Court to take any action other than that mandated by the Court of Appeals decision." February 6, 1992 Order at 1.[2] Because both indictments have been dismissed with prejudice, there no longer appears to be a live case or controversy between petitioner and these respondents.

Should the Court grant the petition, any decision rendered would be purely advisory in nature. See generally Preiser v. Newkirk, 422 U.S. 395, 401 (1975); Mills v. Green, 159 U.S. 651, 653 (1895). Indeed, in its memorandum in support of reconsideration, filed in the trial court, petitioner appeared to concede that dismissal of the indictment would preclude review by this Court. See Government's Motion To Reconsider Dismissal of Indictment at 2 (arguing that the trial court should reconsider its ruling because "[a] lower court may not in effect preclude the Supreme Court from reviewing a lower court decision by dismissing the case before a timely petition for certiorari is filed and acted upon").

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[2]The pendency of its motion for reconsideration of the trial court's ruling is cited by petitioner as reason why there remained a live case or controversy.

Petitioner has appealed the trial court's order dismissing the indictment against Mr. Foster with prejudice. However, the government's appeal -- which can only address the validity of the trial court's dismissal on remand from the Court of Appeals -- cannot serve to revive the underlying controversy that was terminated by that dismissal.

The only authority cited by petitioner for the existence of a live case or controversy is United States v. Villamonte-Marquez, 462 U.S. 579, 581 n.2 (1983). Petitioner's reliance on Villamonte-Marquez is misplaced, however. Respondents in Villamonte-Marquez were convicted of various drug offenses after the District Court denied their motion to suppress marijuana seized from their boat by Customs officials. The Court of Appeals held that the evidence should have been suppressed and reversed their convictions. Following issuance of the mandate, the government dismissed the underlying indictment pursuant to Fed. R. Civ. Pro. 48(a). In holding that there remained a live controversy in that case, notwithstanding dismissal of the indictments, this Court relied on the well-established principle that an indictment merged with a subsequent conviction. 462 U.S. at 581 n.2 (citing United States v. Morrison, 429 U.S. 1 (1976) (per curiam)). See also United States v. R.L.C., 60 U.S.L.W. 4234, 4236 (March 24, 1992) (possibility of reimposing original sentence originally saved the case from mootness, notwithstanding government's failure to seek stay of mandate). In these cases, respondents have not been convicted and there is therefore no judgment into which the dismissed indictments could merge.

Had the Court in Villamonte-Marquez wished to adopt the position apparently advocated by petitioner in this case -- that the Court has the power simply to reinstate an indictment -- it would have had no need to undertake its lengthy mootness analysis. Petitioner cites no authority for the proposition that

the Court can simply reinstate an indictment dismissed with prejudice, where that indictment has not resulted in a conviction.

Moreover, as petitioner recently argued to this Court in its brief in opposition in Republic National Bank of Miami, No. 91-767, cert. granted, 112 S.Ct. 1159 (February 24, 1992), its "failure to take the minimal steps necessary to seek a stay pending appeal undermines its claim to discretionary review by this Court." Brief for the United States in Opposition at 11.[3]

II. Certiorari Should Not Be Granted Because The Decision Of The Court Of Appeals Correctly Reflects The Modern Law Of Criminal Contempt And Double Jeopardy

In the view of respondents, the petition raise two related issues. The first is whether there is an exception to the protection afforded by the Double Jeopardy Clause in successive prosecution cases in cases involving prosecutions for non-summary contempt. By insisting that principles of double jeopardy do not apply to non-summary criminal contempt, however, petitioner relies on an outmoded view of criminal contempt, a view that refuses to consider contempt "a crime in the ordinary sense." Bloom v. Illinois, 391 U.S. at 201. The law of criminal contempt, as it has evolved in this Court in recent years, is fundamentally inconsistent with the existence of a "contempt

[3]Obviously, issuance of the mandate, without more, does not deprive this Court of jurisdiction. Rather, it is subsequent events, namely, the dismissals of the indictments with prejudice, that eliminates any live case or controversy.

exception." The issue then becomes solely one of the proper application of double jeopardy principles to facts of these cases. Application of those principles to these cases is not a difficult task, as the Court of Appeals recognized: Because the government must prove "conduct that constitutes an offense for which the defendant has already been prosecuted," Grady v. Corbin, 110 S.Ct. 2084, 2093 (1990), or, put another way, because the substantive criminal offense is a "'species of lesser included offense,'" United States v. Felix, 60 U.S.L.W. 4259, 4262 (March 25, 1992) (quoting Illinois v. Vitale, 447 U.S. 410, 420 (1980)), of the contempt for which respondents have already been prosecuted, the Double Jeopardy Clause necessarily bars second prosecutions.

A. Non-Summary Criminal Contempt Is Now Recognized As "A Crime In The Ordinary Sense"

Petitioner's primary argument in support of review of the en banc decision of the Court of Appeals is that it is out of step with decisions which have approved successive prosecutions for criminal contempt and substantive criminal violations. However, this view is inconsistent with this Court's decisions in Menna v. New York, 423 U.S. 61 (1975) (per curiam), and Columbo v. New York, 405 U.S. 9 (1972) (per curiam), as well as decisions that have extended full constitutional protections to persons charged with non-summary criminal contempt.

In Columbo, the defendant was held in contempt for refusing a court order to testify before a grand jury, following a grant

of immunity. He was later indicted for his "refusal to answer legal and proper interrogatories," an offense under the New York Penal Law. 405 U.S. at 10. The trial court dismissed the indictment on double jeopardy grounds, but its decision was reversed, based on the appellate court's conclusion that the defendant was held in civil, rather than criminal contempt. Id. The Supreme Court vacated the decision and remanded the case to afford the state court "the opportunity to reconsider the validity of the indictment under the Double Jeopardy Clause of the Constitution." Id. at 11. The remand in Columbo presupposes that principles of double jeopardy are applicable to contempt prosecutions.

Similarly, this Court's opinion in Menna v. New York, 423 U.S. 61 (1975) (per curiam), supports application of principles of double jeopardy to successive prosecutions for criminal contempt and substantive criminal offenses. As in Columbo, the defendant in Menna refused to testify before a grand jury after a grant of immunity. He then refused to obey a court order directing him to testify. He was first held in contempt for refusing to obey the court order, then indicted for refusing to answer the grand jury's questions. After his motion to dismiss the indictment on double jeopardy grounds was denied, he pled guilty. 423 U.S. at 61.

This Court held that the guilty plea did not waive the double jeopardy claim and remanded for a determination of the merits of that claim. 423 U.S. at 62-63. The Court noted that

> [t]he State concedes that petitioner's double jeopardy claim is a strong one on the merits. In light of the flat 30-day sentence imposed, the earlier contempt adjudication was a criminal conviction ... and New York law supports the proposition that the earlier conviction was based, at least in part, on the failure to answer questions ... and was thus for the same crime as the one charged in the instant indictment.

Id. at 62 n.1 (citations omitted).[4]

Petitioner's reliance on In re Debs, 158 U.S. 546 (1895), and In re Chapman, 166 U.S. 661 (1897), to support its view that a criminal contempt conviction does not bar a subsequent prosecution for a substantive criminal offense ignores the dramatic evolution of criminal contempt over the last century. At the time Debs and Chapman were decided, defendants charged with criminal contempt did not enjoy even the most basic constitutional protections applicable to criminal trials. It is hardly remarkable that the Court was then of the view that defendants were not protected by the Double Jeopardy Clause.

In the years since Debs and Chapman were decided, the law of criminal contempt has undergone a complete transformation. Defendants in non-summary contempt proceedings have been granted protections coextensive with those afforded to defendants in ordinary criminal proceedings. In Bloom v. Illinois, 391 U.S. 194, 201 (1968), the Court set forth the view of non-summary

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[4]On remand in both Columbo and Menna, the New York courts held that the subsequent criminal prosecution was barred by the earlier contempt conviction. See People v. Menna, 38 N.Y.2d 850, 382 N.Y.S.2d 56, 345 N.E.2d 599 (N.Y. 1976); People v. Columbo, 31 N.Y.2d 947, 341 N.Y.S.2d 97, 293 N.E.2d 247 (N.Y. 1972).

criminal contempt proceedings that has served as the foundation for this transformation:

> Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. ... [C]onvictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed the role of criminal contempt and that of many ordinary criminal laws seem identical -- protection of institutions of our government and enforcement of their mandates.

Id. at 201. See, e.g., Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987) (right to disinterested prosecutor); Panico v. United States, 375 U.S. 29 (1963) (right to raise insanity defense); Offutt v. United States, 348 U.S. 11 (1954) (right to public trial before unbiased judge); In re Oliver, 33 U.S. 257 (1948) (same); Cooke v. United States, 267 U.S. 517 (1925) (right to counsel, to call witnesses, to be advised of charges and to respond); Ex parte Grossman, 267 U.S. 87 (1925) (eligibility for executive pardon); Gompers v. United States, 233 U.S. 604 (1914) (protection of statute of limitations); Gompers v. Bucks Stove & Range Company, 221 U.S. 418 (1911) (presumption of innocence, proof beyond reasonable doubt, right not to testify). Thus, it is not Grady v. Corbin, 110 S. Ct. 2084 (1990), that has "draw[n] into question," Petition at 17, successive prosecutions for criminal contempt and substantive criminal offenses, but the transformation of the law of criminal contempt.

As the District of Columbia Court of Appeals correctly concluded, 598 A.2d at 732, the reasoning in Bloom and subsequent decisions of this Court recognizing that criminal contempt "is a crime in the ordinary sense" require application of double jeopardy protections to cases involving successive prosecutions for contempt and substantive criminal offenses. The impact of the contempt prosecution on the defendant, Bloom, 391 U.S. at 201, including the imposition of "extremely serious penalties," id. at 207, as well as the danger of government overreaching, id. at 202, are core double jeopardy concerns. See, e.g., United States v. Wilson, 420 U.S. 332, 343 (1975); United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion of Harlan, J.); Green v. United States, 355 U.S. 184, 187-188 (1957).[5]

Petitioner's request that the Court use this case to hold that defendants convicted of criminal contempt should not be protected by the Double Jeopardy Clause's prohibition on successive prosecutions for the same offense is particularly inappropriate on the facts of these cases. Petitioner's argument assumes that the instant contempt prosecutions were brought to vindicate the authority of the court, not to enforce the substantive criminal law. The orders respondents were found to have violated, however, merely compel compliance with the criminal law in general (in the case of Dixon) and specific

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[5]Summary contempt proceedings involve abbreviated procedures and, for that reason, do not raise the same double jeopardy concerns as non-summary contempt proceedings. By definition, a defendant held in summary contempt does not face the burdens of a second trial.

provisions of the criminal law (in the case of Foster). Moreover, at the time of each of these contempt trials, prosecutions for the substantive criminal offense had already been initiated by the United States.

Because of the unusual nature of the court orders in these cases, the contempt prosecutions served the same aims as the substantive criminal law and are therefore contrary to well-established principles of necessity, principles which limit the exercise of the contempt power. As this Court stated in Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 800 (1987)

> [t]hat criminal procedure protections are now required in [criminal contempt] prosecutions should not obscure the fact that these proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather they are designed to serve the limited purpose of vindicating the authority of the court. In punishing contempt, the judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings.

(footnote omitted). See Spallone v. United States, 493 U.S. 265, ___, 110 S. Ct. 625, 632 (1990) ("'in selecting contempt sanctions, a court is obliged to use the "least possible power adequate to the end proposed"'") (citations omitted); United States v. Providence Journal Company, 485 U.S. 693, 701 (1988) (contempt power "is grounded first and foremost upon necessity").

Petitioner's argument for review relies on an outmoded view of criminal contempt, a view that criminal contempt should not be

considered "a crime in the ordinary sense." In addition, because the criminal contempt prosecutions in these cases functioned merely as expedited criminal prosecutions, rather than prosecutions grounded on "necessity," they do not provide appropriate vehicles for the Court to address the question posed by petitioner, namely, whether there is a contempt exception to the Double Jeopardy Clause's prohibition of successive prosecutions for the same offense.

B. Grady v. Corbin Has Clarified The Applicable Double Jeopardy Principles

Petitioner contends that, before this Court's decision in Grady v. Corbin, 110 S. Ct. 2084 (1990), "the great majority of state and federal courts agreed that double jeopardy principles did not prohibit successive prosecutions for criminal contempt and substantive criminal offenses based on the same conduct." Petition at 11. Petitioner contrasts this supposed uniformity with the "conflict" that has developed since Grady began to "sow confusion in the law of double jeopardy." Petition at 17.

This description of the legal landscape before and after Grady is misleading in several respects. Grady did not create the conflict; to the contrary, Grady has served to eliminate much of the conflict in the area. Prior to the decision in Grady, there existed substantial and long-standing disagreement among the state and federal courts regarding the application of double jeopardy principles to successive prosecutions for contempt and substantive criminal offenses. Numerous state and federal courts

had held that successive prosecutions for criminal contempt and substantive criminal offenses were barred by principles of double jeopardy. See, e.g., United States v. Haggerty, 528 F. Supp 1286, 1295-1298 (D. Colo. 1981); United States v. United States Gypsum Co., 404 F. Supp. 619 (D.D.C. 1975); State v. Hope, 449 So.2d 633 (La. Ct. App. 1984); State v. Thompson, 294 Or. 528, 659 P.2d 383 (Ore. 1983); People v. Menna, 38 N.Y.2d 850, 382 N.Y.S.2d 56, 345 N.E.2d 599 (N.Y. 1976); People v. Lombardo, 123 Cal. Rptr. 755, 50 Cal.App.3d 849 (Cal. Ct. Ap. 1975); People v. Columbo, 31 N.Y.2d 947, 341 N.Y.S.2d 97, 293 N.E.2d 247 (N.Y. 1972).[6]

In the months since Grady was decided, however, there has been virtual unanimity on this issue. With only one exception, every court to address the issue after Grady, including the highest courts of Hawaii and South Carolina, has held that successive prosecutions for contempt and substantive criminal

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[6]Many of the state and federal cases cited by petitioner predate the sweeping changes in the law of non-summary criminal contempt and are therefore of questionable value. See, e.g., Orban v. United States, 18 F.2d 374 (6th Cir. 1927); Hansen v. United States, 1 F.2d 316 (7th Cir. 1924); Lewinsohn v. United States, 278 F. 421 (7th Cir. 1921), cert. denied, 258 U.S. 630 (1922); Merchants' Stock & Grain Co. v. Board of Trade of Chicago, 201 F. 20 (8th Cir. 1912); Chicago Directory Company v. United States Directory Company, 123 F. 194 (S.D.N.Y. 1903); Ex parte Morris, 227 P. 914 (Cal. 1924); Ex parte Allison, 90 S.W. 870 (Tex. 1906); Fisher v. McDaniel, 64 P. 1056 (Wyo. 1901).

Similarly, many of the cases cited involve summary, rather than non-summary, contempt. See, e.g., United States v. Rollerson, 449 F.2d 1000 (D.C. Cir. 1971); United States v. Ferrugia, 604 F. Supp. 668 (E.D.N.Y. 1985); United States v. Mirra, 220 F. Supp. 361 (S.D.N.Y. 1963); Maples v. State, 565 S.W.2d 202 (Tenn. 1978). For the reasons stated above, summary contempt does not raise the same double jeopardy concerns as non-summary contempt.

offenses based on the same conduct are barred by the Double Jeopardy Clause. Compare State v. Kipi, 811 P.2d 815 (Haw.), cert. denied, 112 S. Ct. 194 (1991); State v. Magazine, 393 S.E.2d 385 (S.C. 1990); see also State v. Mojarro, 816 P.2d 260 (Ariz. Ct. App. 1991); In re D'Attomo, 570 N.E.2d 260 (Ill. App. Ct. 1991); State v. Vanselow, 572 N.E.2d 269 (Ohio Mun. Ct. 1991); State v. White, 591 A.2d 954 (N.J. Sup. Ct. App. Div. 1991), with Ex parte Williams, 799 S.W.2d 304 (Tex. Crim. App. 1990) (en banc).[7]

The state courts and lower federal courts have had only a short period of time in which to interpret and apply the analysis in Grady to successive prosecutions for criminal contempt and substantive criminal offenses. Indeed, this Court has recently provided additional clarification as to the scope of Grady. See United States v. Felix, 60 U.S.L.W. 4259 (March 25, 1992). Petitioner is asking the Court to intervene prematurely, before there has been an opportunity for any conflict to either crystalize or dissipate. The Court should not step in to resolve a conflict before there has been an opportunity for the conflict to resolve itself.

Indeed, because of the difference between the orders in these cases and the order at issue in Ex parte Williams, it is not clear that there is a "sharp conflict," Petition at 16,

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[7]People v. Heard, 566 N.E.2d 896 (Ill. App. Ct. 1991), cited by petitioner as a second case in which a state court has "rejected a similar double jeopardy argument after Grady," Petition at 16 n.13, involved summary, as opposed to non-summary contempt.

between the two decisions, as petitioner contends. The order at issue in Williams prohibited the parties from "causing or threatening to cause physical contact or bodily injury to each other." Id. at 305.[8] Because the order prohibits lawful as well as unlawful "contact," it clearly does more than direct compliance with provisions of the substantive criminal law.

This is a crucial distinction and one implicitly acknowledged by the District of Columbia Court of Appeals:

> The Grady Court itself recognized that a single act or transaction may constitute two or more types of "conduct," one of which may be punishable in a contempt proceeding and another in a subsequent criminal proceeding. The Court said that its holding,
>
> > would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (i.e., if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence).
>
> 110 S. Ct. at 2094 (footnote omitted). Thus the Court envisioned Corbin's act of driving and hitting two other cars as encompassing at least three different types of conduct: driving while intoxicated, failing to keep right of the median (for both of which he was convicted in traffic court), and driving too fast in heavy rain (for which he was not convicted in traffic court). In like manner, where a civil protection order prohibits assaults and also requires the respondent to stay away from the petitioner, and an assault is committed against the petitioner,

[8]Petitioner's characterization of the order simply as "an injunction forbidding [the defendant] from causing or threatening to cause bodily injury," Petition at 15, is incomplete.

> the language we have just quoted from Grady suggests that the breach of the stay-away portion of the order might be punished as a contempt without jeopardizing a later criminal prosecution for the assault itself. That hypothetical case, of course, is not before us today ....

598 A.2d at 732-733 (footnote omitted).

Decisions interpreting Grady to bar successive prosecutions for contempt and underlying substantive criminal offenses in no way threaten the administration of justice. As the District of Columbia Court of Appeals expressly noted, "[t]he reader should not conclude that civil protection orders can no longer be enforced by contempt proceedings in the post-Grady era." Id. at 733. As outlined by the Court of Appeals, simple adjustments in the drafting of civil protection orders, for example, would permit their enforcement through citations for criminal contempt without "jeopardizing a later criminal prosecution." Id.

Finally, the Court should reject petitioner's suggestion that review should be granted to reconsider "the reasoning and the result" in Grady. Petition at 17. Grady made explicit what had been implicit in numerous prior decisions of this Court, namely, that the scope of the protection afforded by the Double Jeopardy Clause is greater when successive prosecutions, as opposed to multiple punishments, are at stake.

Where multiple punishments in a single trial are involved, this Court has made clear that the Double Jeopardy Clause serves a limited purpose. It "does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359, 366 (1983). The

sole question for the reviewing court is whether the legislature intended to permit multiple punishments. See Jones v. Thomas, 491 U.S. 376 (1989).

In successive prosecution cases, however, "[t]he Double Jeopardy Clause is not a device designed to assure effectuation of legislative intent -- but to the contrary is often the means of frustrating it." Jones, 491 U.S. at 391 (Scalia, J., dissenting). This is because the prohibition on successive prosecutions for the same offense "lies at the heart of the Double Jeopardy Clause." Jeffers v. United States, 432 U.S. 137, 150 (1977). At the most basic level, the Double Jeopardy Clause stands as a barrier to government overreaching, reflecting society's "concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm the government with a potent instrument of oppression." United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977). A second trial forces the defendant to "run the gauntlet" a second time, Green v. United States, 355 U.S. 184, 190 (1957), subjecting him to a second round of "embarrassment, expense and ordeal," compelling him "to live in a continuing state of anxiety and insecurity." Id. at 190.

A second trial also interferes with a defendant's expectation that the results of the first trial would be final. The Double Jeopardy Clause establishes, in effect, "'a constitutional policy of finality for the defendant's benefit' ... [one that] protects the accused ... from attempts to secure

additional punishment after a prior conviction and sentence." Brown v. Ohio, 432 U.S. 161, 165-166 (1977) (citation omitted). Attempts to seek additional punishment through successive prosecutions amount to usurpation of the judicial and legislative role. See United States v. Halper, 490 U.S. 435, 451 n.10 (1989).

The analytical framework relied upon in Grady had been previously articulated in Brown v. Ohio. Brown recognized that the Double Jeopardy Clause requires more extensive inquiry in cases involving successive trials than those involving a single trial:

> The Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some instances where the second prosecution requires the relitigation of factual issues already resolved by the first.

432 U.S. at 166 n.6. See Illinois v. Vitale, 447 U.S. 410 (1980) (focusing on the state's proof); see also United States v. Halper, 490 U.S. 435, 451 n.10 (1989) (distinguishing between the analysis used for multiple punishments and successive prosecution claims); Jeffers v. United States, 434 U.S. 137, 148 (1977) (plurality opinion) (same).

In United States v. Felix, the Court recently clarified the scope of Grady. The Court held that Grady did not overrule long-standing precedent which held that "a substantive crime and a conspiracy to commit that crime, are not the 'same offense' for

double jeopardy purposes." 60 U.S.L.W. at 4263. However, the Court reaffirmed that portion of Grady that recognized that successive prosecutions for offenses that "were not technically lesser included offenses," id. at 4262, were nonetheless barred by the Double Jeopardy Clause when they constituted "a species of lesser included offense." Id. (citing Illinois v. Vitale, 447 U.S. 410, 420 (1977)). Having so recently clarified Grady, the Court should decline petitioner's invitation to reconsider this decision once again.

CONCLUSION

For the reasons set forth above, respondents respectfully request the petition for a writ of certiorari be denied.

Dated: April 6, 1992

Respectfully submitted,

James W. Klein
Counsel of Record

Elizabeth G. Taylor
Rosemary Herbert
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200

Counsel for Respondents

CERTIFICATE OF SERVICE

I, Elizabeth G. Taylor, hereby certify that a true and accurate copy of the Brief of Respondents in Opposition in United States v. Alvin J. Dixon, et al., and respondents' Motion for Leave to Proceed in Forma Pauperis in that action, were served on all parties required to be served in compliance with Supreme Court Rule 29.3, by depositing the documents, first-class postage prepaid, in a United States mailbox on April 6, 1992, addressed to counsel as follows:

Kenneth W. Starr
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

Served pursuant to Rule 29.4(a)

Dated: April 6, 1992

Elizabeth G. Taylor
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001

Counsel for Respondents